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Thirty-fifth session

Summary record of the 743rd meeting
Held at Headquarters, New York, on Wednesday, 19 June 2002, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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02-43320 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.20 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

Draft article 11. Admissibility of evidence in other proceedings

1. **The Chairman** said that the United States delegation had asked for further discussion of draft article 10 of the Model Law to be deferred to allow that delegation to continue consultations and propose a form of wording which satisfied all the delegations and observers. He proposed to move on to consider draft article 11, and invited comments, beginning with the first paragraph of that article.

2. **Mr. Inoue** (Japan) said that his comment centred on the range of third persons referred to in paragraph 1 of draft article 11. While paragraph 61 of the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/514) suggested that such "third persons" were only those involved in the conciliation proceedings, paragraph (1) of draft article 11 suggested that "third persons" referred to a wider circle, not just those involved in the conciliation proceedings. Paragraph (1) also provided that unless the parties agreed otherwise, all third persons' evidence was inadmissible in another forum, whether they were involved in the conciliation proceedings or not. He interpreted that as meaning that the parties could agree to make inadmissible the evidence of persons who, for example, coincidentally happened to know the content of the conciliation procedure. He therefore suggested that the phrase "or a third person" should be moved from its current location in paragraph (1) and be inserted after the first clause of that paragraph, so that it read "(1) Unless otherwise agreed by the parties, a party *or a third person* that participated in the conciliation proceedings ...".

3. **Mr. Sekolec** (Secretary of the Commission) explained that the phrase "or a third person" had originally been inserted to cover third persons — for example, administrative staff or experts — participating in conciliation proceedings, but not considered actual parties to those proceedings. He said that not much thought had been given to the location of the phrase at that time and agreed with the delegation of Japan that it could be moved.

4. **The Chairman** said that the change suggested by the delegation of Japan appeared to make the wording of paragraph (1) clearer and asked if there were any objections to adopting it.

5. **Ms. Moosa** (Singapore) said that her doubts over the Japanese proposal related to whether or not it covered bodies such as conciliation institutions, which often provided facilities and acted as depositaries for documents, including conciliation agreements. They were not themselves participants in conciliation, and she wondered if the intention was for paragraph (1) of to apply to them regardless.

6. **The Chairman** pointed out that the concern raised by the delegation of Singapore was not so much connected with the suggested change but with the text itself. To his recollection, when paragraph (1) was being drafted, the possibility raised by the representative of Singapore was not even contemplated.

7. **Mr. Marsh** (United Kingdom) asked whether his delegation had correctly assessed the impact of the Japanese proposal. If, for example, a party involved in a conciliation proceeding acquired information and relayed it to a third party not involved in that conciliation proceeding, he wondered if that third party would then be entitled to introduce the information into other proceedings. If that was indeed the case, his delegation would be concerned at the narrowing of the scope of inadmissibility, as it believed that the emphasis was not so much on the third parties, as on the information. He stressed that paragraph (5) of draft article 1 would apply in any event.

8. **Mr. Slate** (American Arbitration Association) said he wished to take up the issue of institutions' connection with conciliation proceedings. In arbitration, it was increasingly common for the personnel of arbitral institutions to be subpoenaed, or for documents to be sought, when an arbitration ended up in court. Accordingly, the inclusion of language to cover personnel involved in a proceeding or documents filed with an institution might be advisable, to extend protection to them.

9. **Mr. Shimizu** (Japan) said that to clarify the purpose of his delegation's proposal, he wished to emphasize that the intention was not to change the substance of what had been agreed in the Working Group. He had inferred from the last sentence of paragraph 61 of the draft Guide that the phrase "or a third person" was simply intended to include individuals such as witnesses or experts in the scope of paragraph (1) of draft article 11. That being the substance of the issue, he felt that the language of paragraph (1) would be clearer if the phrase in question was moved. A further argument in favour of such a change was that it would be difficult to explain, in terms of contract law, why a third person uninvolved in any way with a conciliation proceeding should be bound by what was agreed between the parties in that conciliation proceeding. Moving the phrase "or a third person" would make it clear that the "third person" in question had to be a participant.

10. **Mr. Gillen** (International Cotton Advisory Committee), referring to the issue raised by the delegation of Singapore, echoed Mr. Slate's view that individuals involved in nothing more than administering arbitration (in other words, not involved as parties) would often be called upon to appear before a tribunal at some later date, but that in the specific case of conciliation, there might be grounds for affording such administrative personnel some protection.

11. **Mr. Zanker** (Observer for Australia), returning to the issue of the Japanese proposal, wondered whether the phrase to be moved within paragraph (1) should not be "or a third person, *including a conciliator*" rather than simply "or a third person", in order to adhere more closely to the logic of that proposal. The other observations regarding individuals peripherally involved in a conciliation proceeding might be accommodated by adding to the amended phrase wording along the lines of "or a third person that participated in, *or was associated with the administration of*, the conciliation proceedings", so that they would be covered by the privileges set out in paragraph (1), subparagraphs (a) to (f), of draft article 11.

12. **Mr. Getty** (United States of America) endorsed the representative of Singapore's suggestion of including conciliation institutions in paragraph (1). With regard to the issue of moving the phrase "or a third person" to another location within the existing paragraph (1), his delegation believed that the Commission needed to be as broad and inclusive as possible. Retaining the existing wording was the best way of averting the risk that information relayed to a third party not a party in, or not present at, a conciliation proceeding might later be used or be required to be used by virtue of that third party not being an actual participant in the conciliation.

13. **Mr. Lebedev** (Russian Federation) said that his impression from listening to the opinions of the delegations of the United Kingdom and United States was that the Japanese proposal had implications of substance; it was not just cosmetic. As it stood, paragraph (1) meant that a party that was not a direct participant in a conciliation proceeding could not rely on evidence acquired from that conciliation proceeding, and that no court or tribunal could therefore accept such evidence. The current wording was very broad; the risk of accepting the Japanese proposal was that the wording would become more restrictive, applying only to third parties which took part in the conciliation proceeding.

14. Before adopting or rejecting that proposal, he thought it wise for the Commission to exercise some forethought and decide what it wished paragraph (1) to achieve, how it wished the provision to be used and to whom it wished it to apply (any third parties, or only third parties involved in the conciliation proceeding). If the desire was to restrict its scope, then the Japanese proposal should be accepted as entirely logical. If the desire was to give it the widest possible scope, the existing wording should be retained.

15. **Mr. Barsy** (Sudan) said that the goal was to protect the information and views presented during conciliation proceedings. The phrase "or a third person" should be retained, but a limit could justifiably be placed on which third persons were covered, depending on how they obtained information: in the instance in question, information received by submitting it during a conciliation proceeding.

16. **The Chairman** said his impression was that the members of the Commission favoured applying the provisions of paragraph (1) to any third party in receipt of information about a conciliation procedure, whether or not that third party h[illegible] been a participant. That would include personnel of institutions which administered conciliation proceedings. If he heard no objections, he would take it that the existing wording

was considered approved, and the drafting group would be entrusted with formulating wording which expressed the Commission's view.

17. **Ms. Brelier** (France) questioned the wisdom of leaving the matter in the hands of the drafting group, because the Japanese proposal had implications not just of form, but of substance.

18. **Mr. Holtzmann** (United States of America) requested that consideration should be given to replacing the phrase "party *to* the conciliation" in the English version of paragraph (1) (b) of draft article 11 with the phrase "party *in* the conciliation", to correct what appeared to be a typographical error.

19. **The Chairman**, responding to Ms. Brelier, said that the Commission could waste a great deal of time on drafting when it was the drafting group that had a clear mandate to perform that task. Whatever it proposed subsequently returned to the Commission for review. The solution was not being adopted to delegate a task to the drafting group, but to make more rational use of the Commission's time. Responding to Mr. Holtzmann, he said that he and the Secretary of the Commission would examine the typographical error.

20. **Mr. Sekolec** (Secretary of the Commission) said that what the drafting group would be discussing was not the Japanese proposal (though it was consistent with the history of the provision), but the substantive decision to broaden the scope of paragraph (1) to encompass parties to a conciliation proceeding, other participants in a conciliation proceeding and parties that, while not participants in a conciliation proceeding, were connected with it in some other way.

21. **Mr. Morán Bovio** (Spain) agreed with the assessment of the discussion made by the Chairman and by the Secretary of the Commission, and with the decision to leave the matter to the drafting group, which had a clear mandate and which would in any event be reporting back to the Commission.

22. *Paragraph (1) of draft article 11 was provisionally approved.*

23. **The Chairman** said that paragraph (2) of draft article 11, was a corollary of paragraph (1) and was intended to allow for the inclusion of information submitted orally or electronically.

24. *Paragraph (2) of draft article 11 was provisionally approved.*

25. **The Chairman** invited comments on paragraph (3), which referred to the use of the information in question by courts and tribunals and had also been discussed at length by the Working Group.

26. **Ms. Moosa** (Singapore) requested clarification of the word "law" in the last sentence of paragraph (3), asking whether the intention behind it was to include court orders mandating disclosure of information. If that was indeed the case, her delegation would have concerns over the word itself, and over the policy. Its view was that "law" should refer only to written law or legislation.

27. **The Chairman** said that his view, in the light of the first part of paragraph (3), was that "law" referred to a statute or written law. He hoped that if this interpretation was not correct, a member of the Commission would clarify it. If the matter caused a problem, it could be dealt with in the Guide.

28. **Mr. Reyes** (Colombia) asked for the drafting group to consider replacing the two occurrences of the word "*revelar*" in the Spanish version of paragraph (3) with the word "*divulgar*". The request was made in the interests of consistency with decisions made regarding the same concept when the Commission had discussed article 9 of the draft Model Law (A/CN.9/SR.742).

29. **Mr. Sekolec** (Secretary of the Commission) requested Commission members to mark foreign language changes by hand and submit them to the drafting committee.

30. *Paragraphs (3), (4) and (5) of draft article 11 were provisionally approved.*

Draft article 12. Termination of conciliation

31. **The Chairman** said that the draft article was based on practice and on the rules of arbitral institutions.

32. **Ms. Moosa** (Singapore) suggested adding a catch-all phrase to cover less formal situations, such as an oral agreement between the parties, abandonment of the conciliation proceeding by one party or an apology tendered by one party and accepted by the other.

33. **Mr. Holtzmann** (United States of America), agreeing with the representative of Singapore, suggested that the word "written" should be deleted from subparagraphs (b), (c) and (d), since the

requirement of a formal written statement was not specified elsewhere in the draft Model Law.

34. **Mr. Zanker** (Observer for Australia) supported the United States proposal to delete "written" but wondered whether another subparagraph should be added to cover termination by abandonment and other developments which occurred at the parties' initiative rather than through the participation of a third person.

35. **Mr. Reyes** (Colombia) supported the proposals made by the Singaporean and United States delegations, noting that, elsewhere in the Draft Model Law (for example, in draft article 10), there was no explicit reference to written declarations, and that other possibilities were covered by the phrase "by any other means".

36. As for the title of the draft article, it would be more consistent with the rest of the draft Model Law to say "termination of conciliation proceedings". In his country a distinction was drawn between a conciliation (or conciliation hearing), in which the parties met in an effort to arrive at a conciliation and forge a settlement, and the actual conciliation proceedings, which began with the submission of a written or oral request.

37. **Mr. Morán Bovio** (Spain) agreed with the Singaporean proposal and the United States suggestion for implementing it; however, the deletion of "written" should not preclude recourse to written, or even notarized, declarations if warranted. The deletion of "written" also addressed the reservations expressed by the Observer for Australia.

38. He supported the proposal by the representative of Colombia concerning the title of the draft article, which would bring it into line with the rest of the text. The same change should be made to the current English title, "Termination of conciliation".

39. **The Chairman** said that the distinction between conciliation and conciliation proceedings was not completely clear, since both terms implied some sort of settlement.

40. **Mr. Möller** (Observer for Finland) expressed support for deleting "written", even though it might have been stated expressly in previous arbitration or conciliation rules; after all, the thinking had since evolved. He was reluctant to make any further changes; for example, specifying that the conciliation had been reached through "conduct" could give rise to other problems.

41. **Mr. Sekolec** (Secretary of the Commission) suggested that the Commission should consider the consequences of a decision to allow termination by other means — such as an oral agreement, conduct or abandonment — in the wider context of articles 9, 10 and 11, or in a situation where the enacting State was contemplating suspension of the limitation period. While the conciliation rules were for the most part very flexible, the Working Group had felt that a written declaration was necessary in draft article 12 to establish absolute certainty that the proceedings had been terminated.

The meeting was suspended at 11.25 a.m. and resumed at 12.10 p.m.

42. **The Chairman** said that, following informal consultations, most delegations appeared to favour the United States proposal but that views had been expressed on other aspects of the draft article.

43. **Mr. Jacquet** (France) said that, while his delegation would join the consensus on the United States proposal, its support would be less than enthusiastic. Drawing attention to subparagraph (d), he said that, where a conciliation clause had been inserted in a contract, both parties were required to make some minimum effort at conciliation; thus, a party should not be allowed, by a mere oral declaration, to terminate proceedings which had not even begun. To avoid that undesirable eventuality, he proposed adding "within a reasonable time period" after "other party" (which was preferable to permitting the obligation to be discharged through a single meeting of the parties).

44. **Mr. Heger** (Germany) said that his delegation, too, would support the United States proposal in a spirit of consensus but that it would have preferred to retain "written" in order to pre-empt suspension of the limitation period, which was a well-known consequence in German law.

45. **Mr. Lebedev** (Russian Federation) pointed out that the Working Group had opted, after meticulous discussions, to specify "written declarations" not only because of the wider consequences referred to by the Secretary of the Commission but also in relation to article 14, which dealt with the impossibility of initiating judicial or arbitral proceedings where the parties had already reached an agreement in conciliation proceedings. A clear-cut written declaration would be particularly important in the cases set out in subparagraphs (b), (c) and (d), where the

parties could not reach an amicable settlement and judicial or arbitral proceedings would necessarily be the next step.

46. If the Commission decided to delete "written" — even though most Commission members were also Working Group members and had previously agreed on the importance of the term — it was highly likely that individual States, in adopting the Model Law, would find it necessary to reinstate it. That would certainly be the case for his delegation.

47. In subparagraph (d), an indication of absolute certainty would also be necessary in cases where, as the Observer for Australia had hypothesized, one of the parties was persistently passive (for example by not responding to letters and otherwise remaining silent) and hence the declaration of termination was, in effect, a unilateral statement by one party.

48. **Mr. Maradiaga** (Honduras) said that he wished it to be placed on record that he was not convinced it would be appropriate to eliminate the word "written". Under Germanic Roman law much importance was placed on the existence of a document which faithfully reflected the content of agreements.

49. **Mr. Graham** (Mexico) said that even though his delegation had agreed that the word "written" should be deleted, it assumed that professionals in conciliation proceedings would normally wish to ensure that a written declaration was made.

50. With regard to the concept of abandonment of proceedings, he suggested that slight adjustments could be made to subparagraphs (b) and (d) to take the reasonable intent of parties to carry out consultations into consideration, without the need to insert an additional subparagraph. In his opinion, subparagraphs (b), (c) and (d) already provided an adequate structure and clearly identified the three variants.

51. **Mr. Holtzmann** (United States of America), in reference to the issue of abandonment of conciliation proceedings or conduct of parties, said that one possible solution would be to leave the word "written" in subparagraphs (b), (c) and (d) and to insert a subparagraph (e) referring to the conduct of the parties in the event that one or more parties considered the conciliation terminated. If that additional subparagraph were not inserted, then the word "written" should in fact be deleted from subparagraphs (b), (c) and (d).

52. With respect to the suggestion made by the representative of France on contractual agreements requiring parties to conduct conciliation proceedings for a period of time, he said that the parties to a dispute had the option to make such contracts, at their discretion, but he believed that it would not be appropriate for the draft Model Law to attempt to specify such time periods. In order for conciliation to be effective, all parties must have the will to ensure that it produced positive results, otherwise the exercise would prove futile.

53. Commenting on the German delegation's support for retaining the word "written" in subparagraphs (b), (c) and (d), he said his delegation agreed that there was often a need to precisely state the timing of termination, in particular for States which had adopted article X, the footnote article to article 4. Likewise, there was also a need for precision in the definition of the commencement of proceedings. He hoped that the draft Guide to Enactment would point out that States wishing to adopt article X should give careful consideration to precisely defining the commencement and termination of proceedings.

54. The representative of the Russian Federation had pointed out that although subparagraph (b) required that the conciliator should consult with the parties, the provisions of that subparagraph would cease to operate in the event that one of the parties refused to appear for consultation. His delegation believed one possible solution would be to replace the phrase "after consultation with the parties" with "after inviting the parties to conciliate".

55. **Mr. Möller** (Observer for Finland) welcomed two of the United States proposals, firstly, that subparagraph (b) should be amended, inviting the parties to conciliate, and secondly, that the Model Law should not specify a time period for conciliation. However, his delegation strongly opposed the addition of subparagraph (e) if the word "written" were to be retained, as that would lead to the potential difficulties as raised earlier by the Secretary of the Commission.

56. **Mr. Barsy** (Sudan) said that the word "written" in subparagraphs (b), (c) and (d) was very important because it gave precision to the termination of the conciliation proceedings. Moreover, the suggestion with respect to inviting the parties to consult could pose certain difficulties. For instance, undue delays could arise in the event that communications inviting

the parties to such consultations did not reach their intended destination in a timely fashion.

57. **The Chairman** said that in spite of some objections expressed by delegations, the prevailing view was that the word "written" should be deleted. On the other hand, the proposal to add a subparagraph on conduct of the parties had not garnered much support, even though there was some concern for situations in which one of the parties to a dispute might refuse to cooperate with the proceedings. In that regard, discussion was expected to continue on the proposal that subparagraph (b) should be modified to enable a conciliator or panel of conciliators to invite the parties to hold consultations.

58. Moreover, one comment had been made to the effect that, in the presence of a conciliation agreement, proceedings could not be terminated before a minimum period had elapsed and a certain amount of effort had been exerted. In reaction to that comment, it had been suggested that the consequences of the failure to comply with a conciliation agreement related to contract law and therefore fell outside the purview of the draft Model Law.

59. **Mr. Markus** (Observer for Switzerland) said he wished to endorse the views expressed by the Observer for Finland, and especially to state his strong opposition to the addition of a subparagraph on conduct or abandonment of proceedings. Furthermore, he favoured the deletion of the word "written". It was important to find a middle ground between excessive formality and uncertainty. He entirely agreed with the idea of maintaining consistency throughout the Model Law: if it were determined that time limitations should be specified with respect to the termination of proceedings, then a similar clause should be introduced in article 4.

60. As for the French proposal, if an agreement had been reached, article 14 might appropriately have been used to enforce such agreement. Otherwise, it would be impossible to force parties to meet if either party was unwilling to do so.

The meeting rose at 1 p.m.